Supreme Court, U.S.
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No. 10-347

In The
Supreme Court of the United States

ZVI GUTTMAN,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND & EDWARD J. GALLAGHER,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The Petition incorrectly identifies the Respondents' names. The correct names of the Respondents are the Mayor and City Council of Baltimore and Edward J. Gallagher. The legal name for the corporate entity commonly referred to as the City of Baltimore is the "Mayor and City Council of Baltimore." *See* BALTIMORE CITY CHARTER, Art. § 1 ("The inhabitants of the City of Baltimore are a corporation, by the name of the "Mayor and City Council of Baltimore," and by that name shall have perpetual succession, may sue and be sued, may purchase and hold real, personal and mixed property and dispose of the same for the benefit of the City, as herein provided, and may have and use a common seal, which may be altered at pleasure.").

Neither current Mayor Stephanie Rawlings-Blake nor her predecessors were named as defendants in this case.

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STATEMENT OF THE CASE

A. Factual Background

On December 12, 2001, while the Mayor and City Council of Baltimore ("the City") employed Deborah Mullins' husband, Jimmy Mullins, in its body shop in the City's central garage, Mrs. Mullins entered into a requirements contract with the City to perform automobile body repairs performed on City owned vehicles. The Contract, known as BP-02055, permitted vendors like Mrs. Mullins to bid for body repair work by submitting proposed repair estimates to the City's body shop where Mr. Mullins worked. During the 26 months from February 1, 2002 through April 31, 2004, the City paid Mrs. Mullins the sum of $292,087.07 for 200 repair awards.

Michael Enright, the Deputy Mayor of the City of Baltimore, asked Donald Huskey, the Deputy City Solicitor, and George Winfield, the Director of Public Works, to investigate the quality of the work performed by Mrs. Mullins, the relationship between Mrs. Mullins and a City employee (Mr. Mullins), and the possible debarment of Mrs. Mullins from City contracts. Mr. Huskey and Mr. Winfield asked Leslie Winner, Esq., an attorney in the City Law Department's Contracts Division, to conduct a preliminary investigation to address Mr. Enright's concerns. Because Mrs. Winner was unaware of the Contract, she "called around trying to gather information to find out what was going on."

WBFF-TV (Fox 45) of Baltimore broadcast statements by Mrs. Mullins as part of news stories that aired on January 14, 2004 and February 19, 2004. Mrs. Mullins' statements were included in the January 14, 2004 broadcast, which addressed the age and condition of the automobile fleet used by Baltimore Police Department detectives. During the broadcast, Ms. LaPolla, the FOX 45 reporter, erroneously stated, "And DPW workers should know. Their agency is the one responsible for keeping unmarked police cars on the road." In fact, these vehicles are neither owned nor serviced by the City or its contractors.

On January 16, 2004, Mrs. Winner advised Mr. Huskey that Mr. Winfield had briefed her about the Contract. Mr. Winfield never asked or suggested to Mrs. Winner that Mrs. Mullins' Contract be terminated. When Mrs. Winner submitted her written response to Mr. Enright on February 4, 2004, entitled "Confidential Legal Advice Memorandum," she was unaware of Mrs. Mullins' statements on television on January 14, 2004. The memorandum, therefore, included no information concerning Mrs. Mullins' statements presented during the televised report.

Mr. Winfield discussed with Charles Krysiak, the Chief of the City's Fleet Management Division, the January 14, 2004 WBFF-TV broadcast that blamed the poor condition of the detectives' vehicles on Fleet Management Division, even though it neither owns nor maintains those vehicles.

Although Mr. Edward Gallagher, the acting City purchasing agent, neither saw the January 14, 2004, newscast nor was aware of the nature or content of Mrs. Mullins' comments, Mr. Gallagher, according to Mr. Krysiak, called him after January 14, 2004 to inquire about Mrs. Mullins' performance as a vendor. Mr. Gallagher does not recall speaking with Mr. Krysiak about Mrs. Mullins. Mr. Gallagher did not receive any memoranda from Mr. Krysiak recommending Mrs. Mullins' termination. Mr. Krysiak does not know why Mr. Gallagher recommended that Mrs. Mullins' Contract be terminated. Mr. Krysiak does not know why the Board of Estimates voted to terminate the Contract.[1]

Mr. Gallagher and Mr. Winfield testified that they never discussed the termination of Mrs. Mullins' Contract. In fact, Mr. Winfield never asked or suggested to anyone that Mrs. Mullins' Contract be terminated.

Based on the information in Mrs. Winner's Legal Advice Memorandum, Mr. Gallagher recommended that the Board of Estimates terminate Mrs. Mullins' Contract with the City because "her husband worked in the City's body repair shop and that Mrs. Mullins

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[1] "The Board of Estimates is composed of the Mayor, the President of the City Council, the Comptroller, the City Solicitor and the Director of Public Works." BALTIMORE CITY CHARTER, Art. VI, § 1. The Board has the final authority to award contracts and supervise purchasing. BALT. CITY CHARTER, Art. VI, § 11(a).

was a vendor that bid on projects to repair City vehicles. And my concern was that that relationship certainly created a perception of a conflict of interest." Mrs. Winner's legal memorandum had highlighted the concern that "the chief of Central Garage must see Mr. Mullins as not purposefully or accidentally made privy to any insider information regarding the separate awards." Mr. Gallagher "did not see it as a reasonable task to impose on the management of the Central Garage that they cloister one of their employees constantly to make sure there's no information that that employee receives regarding such an open process as the bid."

Mrs. Mullins' statements about the condition of the Police Department's marked patrol car fleet were broadcast during a February 19, 2004 WBFF report concerning why police officers were involved in 548 motor vehicle accidents in 2003.

On March 10, 2004, Mr. Gallagher sent Mrs. Mullins a letter to notify her that the City's Board of Estimates intended to consider terminating her Contract under the Contract's termination for convenience clause. On March 12, 2004, Mr. Gallagher submitted a request for action to the City's Board of Estimates, placing the issue of whether to terminate Mrs. Mullins' Contract on the Board's agenda.

On March 24, 2004, the Board of Estimates approved a resolution terminating Mrs. Mullins' Contract "for convenience." On March 29, 2004, Mr. Gallagher sent Mrs. Mullins a letter notifying her of

the Board of Estimates' termination of her Contract during their March 24, 2004 meeting.

Prior to the Board of Estimates' termination of Mrs. Mullins' Contract on March 24, 2004, there is no evidence that any of the members of the Board of Estimates had knowledge that Mrs. Mullins had appeared on television on either January 14, 2004 or February 19, 2006, and made statements about City vehicle repair issues.

B. The Proceedings Below

The Petitioner, Zvi Guttman, trustee in bankruptcy for Mrs. Mullins, filed an amended complaint in the Circuit Court for Baltimore City against the Respondents, the City and Edward J. Gallagher, alleging a violation of the First Amendment to the United States Constitution. The Circuit Court dismissed the case, finding that Mrs. Mullins' speech was not entitled to constitutional protection. On October 19, 2007, the Court of Special Appeals of Maryland reversed the judgment and remanded the case, holding that Mrs. Mullins' broadcast speech was entitled to constitutional protection.

After a jury trial, the Circuit Court entered judgment in favor of the City on count one, finding no breach of the Contract. The jury found in favor of Mrs. Mullins and the trial court entered judgment in the amount of $110,000 on September 5, 2008, for count three, which alleged a retaliatory termination of the Contract in violation of the First Amendment to

the United States Constitution. The jury, however, found in special interrogatory number 5 of the verdict sheet that, "At the time the contract was terminated," the City had "knowledge or grounds to terminate the contract with Plaintiff regardless of Plaintiff's protected statement on Fox 45."

The trial court entered an amended judgment in the amount of $120,000 on October 8, 2008. The City noted an appeal on November 5, 2008, with Mrs. Mullins noting a cross-appeal on November 10, 2008. On February 2, 2010, the Court of Special Appeals reversed the judgment against the City, because Mrs. Mullins was unable to show that a majority of the members of the Board of Estimates had knowledge of her protected speech prior to voting to terminate her Contract with the City. The appellate court vacated the judgment as to Mr. Gallagher, holding that he was not a final policymaker under 42 U.S.C. § 1983 and that he was not entitled to legislative immunity. The court remanded the case for further proceedings action as to the individual capacity claim against Mr. Gallagher.

On June 11, 2010, the Court of Appeals of Maryland denied the petition for writ of certiorari filed by Mrs. Mullins and the cross-petition filed by Mr. Gallagher.

REASONS FOR DENYING THE PETITION

I. The Petitioner's Question As To The Evidentiary Burdens Of *Monell* Does Not Warrant Further Review.

A. The Question Seeking A Radical Revision Of § 1983 Jurisprudence Was Not Raised, Briefed, Argued Or Decided Below.

In her first question presented, Mrs. Mullins argues that the Court should review this case because the evidentiary burden established by *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny makes it difficult to establish municipal liability and is overly complex. Recognizing that "*Monell* liability is not a form of *respondeat superior,* but that instead, a municipality can only be held liable 'when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible for under section 1983,'" Mrs. Mullins asks this Court to scrap more than thirty years' jurisprudence. *Valentino v. Village of South Chicago Heights*, 575 F.3d 664, 674-675 (7th Cir. 2009) (quoting *Monell*, 436 U.S. at 694).

While Mrs. Mullins has asserted a claim against the City for the violation of her constitutional rights, she has not in any lower court made the argument that *Monell*'s bases for municipal liability should be fundamentally altered or that there should be

respondeat superior liability for municipalities in actions brought under 42 U.S.C. § 1983. Mrs. Mullins has not offered an alternative basis for municipal liability. These issues simply have not been raised, briefed, argued or decided below.

Instead, Mrs. Mullins' claim has been pursued in the Maryland trial and appellate courts within the well-established parameters of *Monell*. A fundamental reinterpretation of § 1983 and its application to municipalities, after its application in thousands of cases in virtually every court in the country, should not be undertaken as an afterthought in a case in which the issue has not been raised or considered. Therefore, Mrs. Mullins' first question presented is not properly raised at this time and the Court should not grant further review for its consideration.

B. The Law And Facts Of This Case Do Not Warrant The Consideration Of The *Monell* Question.

Even if the question is properly presented, the factual and legal milieu of the present case does not support the proper consideration of Mrs. Mullins' question. Mrs. Mullins alleges that she suffered adverse action in retaliation for her protected speech. For the City to be liable under *respondeat superior*, there must be evidence that a City employee or agent took the improper retaliatory action while acting within the scope of employment. *See, e.g., Sherrod v. Palm Beach County School Dist.*, 424 F.Supp.2d 1341,

1344 (S.D.Fla. 2006) ("[T]he doctrine of *respondeat superior*, the tort principle which holds an employer liable for the acts of an employee committed in the course and scope of the employment, does not apply in the § 1983 context.").

1. The City's Board of Estimates Was The Entity That Terminated Mrs. Mullins' Contract.

To impose *respondeat superior* liability on the City, the actor whose wrongful actions are to be attributed to the City must be identified. That actor was the City's Board of Estimates. "The Board of Estimates is composed of the Mayor, the President of the City Council, the Comptroller, the City Solicitor and the Director of Public Works." BALTIMORE CITY CHARTER (1996 ED.), Art. VI, § 1. The Board of Estimates is the entity within the City's government that has the final authority over the awarding, supervision and termination of the City's contracts. BALT. CITY CHARTER, Art. VI, § 11(a). ("The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter.").

The adverse action in this case was the termination of Mrs. Mullins' Contract with the City. Paragraph XXIX.A of the Contract provides, in part, "Upon recommendation of the City Purchasing Agent, the Board of Estimates reserves the right to terminate any contract . . . "

Paragraph XXIX.C of the Contract provides, in part, "The performance of work under this contract may be terminated by the City in accordance with this clause in whole, or in part, whenever the City Purchasing Agent shall determine that such termination is in the best interests of the City." Thus, in the Contract, the Board of Estimates explicitly retained its power to terminate the Contract, even if the action was taken on the recommendation of the purchasing agent.

As a matter of state law, whatever authority was provided to the City's purchasing agent in the Contract, it could not diminish the Board of Estimate's role as the final authority in awarding contracts and supervising all purchasing by the City. *See Tuxedo Cheverly Vol. Fire Co. v. Prince George's County*, 39 Md. App. 322, 330 (1978) (If the municipality's charter provisions are not precisely followed during the contracting process, the contract is *ultra vires*, or outside the power of the municipal corporation to make, and void *ab initio*.).

Similarly, any delegation by the Board of Estimates of its authority to terminate Mrs. Mullins' Contract would have been unenforceable as *ultra vires*. *See Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 161 (1999) ("The City has no right under the law to delegate its governing power to any agency. The power of the City is prescribed in its charter, and the City Charter constitutes the measure of power that is possessed by any of its officials. To delegate such power to an independent agency would

be a serious violation of the law."). There was no attempted delegation in this case, but any such attempt would have been illegal and void.

Mr. Gallagher's recommendation to the Board of Estimates that it terminate Mrs. Mullins' Contract could not preempt or usurp the Board of Estimates' authority to terminate the Contract. *See Gontrum v. Mayor and City Council of Baltimore*, 182 Md. 370, 375-376 (1943) ("The effect of the acts of an officer of a municipal corporation . . . is a matter of . . . public law."). The City's Charter specifically provides that any recommendation as to the appropriate decision to be made by the Board of Estimates "is advisory only and not binding on the Board." BALTIMORE CITY CHARTER, Art. VI, § 11(g)(1)(v). Thus, as a matter of law, Mr. Gallagher's recommendation to the Board of Estimates to terminate Mrs. Mullins' Contract was "advisory only." Only the Board of Estimates took adverse action against Mrs. Mullins. Therefore, any possible *respondeat superior* liability of the City would have to be based on the Board's action.

2. There Is No Evidence Of Wrongdoing By The Board Of Estimates, For Which The City Could Be Liable Under *Respondeat Superior*.

There is no evidence to establish that the Board's action was unlawful. Among other things, Mrs. Mullins had the burden of proving that her protected speech was a "motivating factor" in the Board of

Estimates' decision to terminate her Contract. *Gasper v. Ruffin Hotel*, 183 Md. App. 211, 222 (2008). To do this, Mrs. Mullins had to establish that the Board of Estimates acted with actual knowledge of her protected speech. *See Chappell v. Southern Maryland Hosp., Inc.*, 320 Md. 483, 497 (1990) ("In order to establish a *prima facie* case of retaliatory action . . . a plaintiff must demonstrate that the employer was aware of plaintiff's participation in protected activity . . . "); *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007) ("The first thing [plaintiff] must be able to prove, therefore, is [defendant's] knowledge that he engaged in a protected activity."); *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 501 (4th Cir. 2005) ("a plaintiff in a retaliation case must show, at the very least, that the defendant was aware of her engaging in protected activity"); *Hooven-Lewis v. Caldera*, 249 F.3d 259, 278 (4th Cir. 2001) ("Without knowledge of the protected disclosure, the disclosure could not have been the cause of the alleged reprisals."); *Dowe v. Total Action against Poverty*, 145 F.3d 653, 657 (4th Cir. 1998) ("Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the prima facie case."). *See also O'Conner v. Chicago Transit Auth.*, 985 F.2d 1362, 1370 (7th Cir. 1993) ("Allegedly protected speech cannot be proven to motivate retaliation if there is no evidence that the defendants knew of the protected speech."); *Schlarp v. Dern*, 610 F.Supp.2d

450, 470 (W.D.Pa. 2009) (plaintiff alleging First Amendment retaliation "bears the burden of producing *some evidence* that the relevant decision makers knew – at the time the decision was made – about his testimony before the Ethics Commission, his filing of formal grievances, and his refusal to sign the letter to the federal district judge"); *McFarland v. George Washington University*, 935 A.2d 337, 357 (D.C.App. 2007) ("[I]n order to establish the element of causation in a *retaliation* claim, an employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity.").

3. There Is No Evidence That The Members Of The Board Of Estimates Had Knowledge Of Mrs. Mullins' Speech.

The members of the Board of Estimates who voted to terminate Mrs. Mullins' Contract with the City were: Honorable Martin O'Malley, Mayor; Honorable Sheila Dixon, President of the City Council; Honorable Joan I. Pratt, Comptroller; City Solicitor Thurman Zollicoffer and Public Works Director George Winfield. Mrs. Mullins did not offer any direct evidence at trial concerning the knowledge of Mayor O'Malley, City Council President Dixon, Comptroller Pratt and Solicitor Zollicoffer of Mrs. Mullins' protected speech when they voted on the resolution

terminating the Contract.[2] Without evidence that these four members of the Board of Estimates had

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[2] Mrs. Mullins did not offer positive evidence that Mr. Winfield knew of her protected speech, relying instead on perceived inconsistencies between his deposition testimony and Mrs. Winner's notes and legal memorandum. Mr. Winfield's failure to recall that he spoke to Mrs. Winner about the automobile body repair Contract and that he spoke to a subordinate about the January 14, 2004, Fox news story in which the subordinate had appeared is insufficient to show that Mr. Winfield had actual knowledge of Mrs. Mullins' protected speech. *See Campion v. City of Springfield*, 559 F.3d 765, 770 (7th Cir. 2009) ("contradictions" in aldermen's testimony "about his knowledge of" the contractor's activities and "about their reasons for replacing" the contractor failed to show that the contractor's "protected activity was a motivating factor for the City Council's decision to" terminate the contractor).

Mr. Winfield saw the newscasts featuring Mrs. Mullins' protected statements for the first time two weeks prior to his deposition taken on July 28, 2005. *See Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1156 (11th Cir. 2002) ("[N]either a court nor a jury may impute knowledge to a decision-maker who has sworn he had no actual knowledge.").

Even if, as Mrs. Mullins claims, Mr. Winfield operated under an illegal retaliatory motivation, his single vote on the Board of Estimates could not suffice to render the action of the entire Board unlawful. *See Wragg v. Village of Thornton*, 604 F.3d 464, 469 (7th Cir. 2010) ("[T]here can be no municipal liability for the isolated acts of only one member of a multi-member board."). Under § 1983, a plaintiff cannot impose liability on a governmental entity based on evidence of the pretextual motivation of one of its members. *See Campion*, 559 F.3d at 770 (one alderman's unlawful retaliatory motivation cannot be imputed to the others); *La Verdure v. County of Montgomery*, 324 F.3d 123, 125 (3rd Cir. 2003) (no municipal liability because board voted unanimously and only one member had improper motive); *Matthews v. Columbia County*, 294 F.3d

(Continued on following page)

actual knowledge of her protected speech, Mrs. Mullins could not prevail on her retaliation claim. *See Baqir v. Principi*, 434 F.3d 733, 748 (4th Cir. 2006) (No retaliatory motive shown where evidence failed to show that the relevant officials were aware of plaintiff's contact with the EEO Counselor or his filing of an administrative complaint at the time the alleged retaliation occurred.); *Campion v. City of Springfield*, 559 F.3d 765, 770 (7th Cir. 2009) (rejecting the plaintiff's First Amendment retaliation claim, finding that there was no evidence showing that all of the aldermen and the Mayor who had voted to terminate the city's contract with an independent contractor actually knew that the plaintiff was a member of organization holding socially conservative views); *Patton v. Indianapolis Public School Board,* 276 F.3d 334, 340 (7th Cir. 2002) (defendant granted summary judgment where plaintiff produced no evidence that defendant knew of protected speech); *Beattie v. Madison County School Dist.,* 254 F.3d 595, 604 (5th Cir.

1294, 1297 (11th Cir. 2002) (The existence of an unconstitutional motivation by only one commissioner is insufficient to impute such a motive to the commission at large.); *Jeffries v. Harleston*, 52 F.3d 9, 14 (2nd Cir. 1995) ("[T]he nine votes based on legitimate grounds constitute a superseding cause breaking the causal chain between the tainted motives . . . and the decision"); *Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1239 (9th Cir. 1994) (no municipal liability because board acted unanimously and only one member had improper motive); *see, e.g., Dixon v. Burke County, Ga.*, 303 F.3d 1271, 1276 (11th Cir. 2002) ("no municipal liability can attach for one tainted vote out of twelve cast").

2001) (finding that without "actual knowledge" of the plaintiff's protected activities, the board and school district could not be liable); *Orenge v. Veneman*, 218 F.Supp.2d 758, 766 (D.Md. 2002) ("Because Plaintiff has failed to show that [supervisor] had knowledge of Plaintiff's protected EEO activity when he denied her promotion request, she fails to establish a causal connection.").

4. Imputed Or Constructive Knowledge Of Protected Speech Is Not Sufficient To Prove Retaliation.

In light of the lack of any evidence that a majority of the members of the Board of Estimates had actual knowledge of Mrs. Mullins' protected speech, she argues that knowledge of her speech can be imputed to Mayor O'Malley through his deputy, Michael Enright, and to City Solicitor Zollicoffer, through his deputy, Donald Huskey.[3]

Neither imputed nor constructive knowledge of Mrs. Mullins' protected speech is sufficient to prove that the City's Board of Estimates retaliated against her for that speech. Knowledge of Mrs. Mullins' protected speech cannot be imputed to the members of the Board of Estimates. *See Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1235 (11th Cir. 2010) ("Furthermore,

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[3] Mrs. Mullins has not asserted that either City Council President Dixon or Comptroller Pratt had actual or imputed knowledge of Mrs. Mullins' protected speech.

knowledge on the part of persons other than a decision maker cannot be imputed from other supervisors to the decision maker . . . "); *see also Olson v. GE Astrospace,* 101 F.3d 947, 954 (3rd Cir. 1996) (knowledge of one party cannot be imputed to another who is making the decision). "Constructive knowledge is not enough; the employee must show that the decision-makers responsible for the adverse action had actual knowledge of the protected activity." *Furline v. Morrison*, 953 A.2d 344, 355 (D.C.App. 2008).

Even though the members of the Board of Estimates did not have any knowledge of Mrs. Mullins' protected speech, Mrs. Mullins attempts to impute knowledge of her protected speech to Board of Estimates members Mayor O'Malley and Solicitor Zollicoffer based on the inferred knowledge of Mr. Enright and Mr. Huskey. Mrs. Mullins seeks to impute an inference of knowledge, which is impermissible speculation. *See Schlarp v. Dern*, 610 F.Supp.2d 450, 472 (W.D.Pa. 2009) (rejecting attempt to impute knowledge to final decisionmakers and finding "an inferred fact may not be used as a basis for a further inference, thereby extending a chain of inferences into the realm of pure conjecture").

The "knowledge" supposedly possessed by Mr. Enright and Mr. Huskey was based on the contents of the legal memorandum written by Leslie Winner. However, that memorandum did not contain any information about the protected speech because: (1) the memorandum predated the February 19, 2004

broadcast and (2) Mrs. Winner herself was unaware of Mrs. Mullins' speech broadcast on January 14, 2004. Neither Mr. Enright nor Mr. Huskey could have acquired knowledge of Mrs. Mullins' January 14, 2004, speech from Mrs. Winner's legal memorandum. Thus, there is no evidence that either Mr. Enright or Mr. Huskey had any knowledge that could be imputed to their superiors. Accordingly, even if constructive or imputed knowledge of subordinates were a sufficient basis for municipal liability, there was, in reality, no evidence of knowledge that could be imputed to the members of the Board of Estimates. Under current law, even if Messrs. Enright and Huskey had actual knowledge of the protected speech, their knowledge alone would be insufficient to prove that the Board of Estimates terminated the Mullins Contract in retaliation for Mrs. Mullins' protected speech.

In the absence of evidence that the members of the Board of Estimates, or at least a majority of the members of the Board, knew of Mrs. Mullins' protected speech, the evidence is insufficient to establish that the termination of the Contract was retaliatory. Thus, there was no unlawful retaliation for which the City could be held liable under *respondeat superior*. Therefore, the law and the facts of this case do not warrant a reconsideration of *Monell*'s requirements for municipal liability.

II. There Was Insufficient Evidence To Support Municipal Liability.

Mrs. Mullins' second question concerns her attempt to prove that the members of the Board of Estimates had actual knowledge of her protected speech, by imputing to them the supposed knowledge of their subordinates. It is clear from the cases cited above that the causal connection between protected conduct and adverse action must be established by evidence that the person or entity taking the action was at least aware of the conduct.

It is also clear from the facts of this case that the Board members' subordinates who read Leslie Winner's memorandum, which contained no information about the protected speech, could not have acquired knowledge of the speech from the memorandum. Moreover, there was no evidence that they were aware of the speech through any other means. Therefore, even if imputed or constructive knowledge were permissible to prove causation, which they are not, there was no knowledge on the part of the subordinates that could be imputed to the members of the Board of Estimates.

The Court of Special Appeals of Maryland resolved Mrs. Mullins' question correctly. There is no need for this Court to devote its time and energies to the consideration of an issue that is precluded by the facts of the case.

III. As A Matter Of Law, Mr. Gallagher Was Not A Final Policymaker And Did Not Terminate The Contract.

Mrs. Mullins also asks that the Court consider the question whether Mr. Gallagher, the City's acting purchasing agent, was a final policymaker and was in fact the person who terminated the Contract. As has been made clear in Argument I.B.1 above, Mr. Gallagher did not have the authority to terminate the Contract; the Board of Estimates was the entity that actually terminated the Contract.

Under the state law set forth above, and therefore, under federal law, only the Board of Estimates had the power to terminate the Contract and it was the sole policymaker with respect to contracts and purchasing. The Board was powerless to delegate its authority to Mr. Gallagher and, in fact, the Board explicitly retained its authority in the Contract. As a matter of law, then, Mr. Gallagher could not be a final policymaker with respect to terminating the Contract.

Aside from any consideration of who possessed authority to terminate the Contract, the fact is that the termination was actually accomplished by a resolution of the Board of Estimates. Even if Mr. Gallagher had had the power to terminate the Contract, he did not exercise that power, but deferred to the ultimate authority of the Board of Estimates.

The decision of the Court of Special Appeals was correct as a matter of law and the facts support that

decision. There is no reason for this Court to re-analyze the very clear Maryland law as to the powers of the Board of Estimates and the inability of that body to delegate its authority to any other entity.

IV. The Issue Of Attorney Fees Does Not Warrant Further Review.

Mrs. Mullins has requested that the Court review the denial of her petition for attorney fees. However, she has not presented any reason for review by this Court. Because it is clear that Mrs. Mullins failed to present evidence sufficient to support her claims against the City, there was no reason for the Court of Special Appeals to disturb the trial court's decision. And as the Maryland appellate court correctly noted, because the case has not been resolved as to the claim against Mr. Gallagher, a ruling on attorney fees as to that claim is premature. The Court should not grant review to consider the denial of attorney fees.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that the Court deny the petition.

Respectfully submitted,

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